No. 89-2023

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IN THE

Supreme Court of the United States

October Term, 1989

BRADLEY RICHIE,

Petitioner,

against

THOMAS A. COUGHLIN, III, Individually and as Commissioner of the Department of Correctional Services; THE DEPARTMENT OF CORRECTIONAL SERVICES; JOSEPHINE L. GAMBINO, Individually as Commissioner of the New York State Department of Civil Service and as President of the Civil Service Commission, ROBERT RIORDAN, Individually and as Commissioner of the Civil Service Commission; THE CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK; and THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD DEPARTMENT OF THE NEW YORK STATE SUPREME COURT

BRIEF IN OPPOSITION

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Question Presented

Whether certiorari is warranted based upon a claimed conflict with *Cleveland Bd. of Ed. v. Loudermill,* 470 US 532 (1985), when, in reality, the decision under review overruled so much of a prior state decision which was arguably at odds with *Loudermill.*

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Facts

Petitioner's version of the facts (Pet, pp 6-11)[1] is distorted, misleading, and incomplete. Some of the alleged facts are simply unsupported by evidence in the record. For example, petitioner asserts (Pet, p 6) that his escape from jail was due to his attending church. That may make for a nice story, but it is simply not true. In fact, while incarcerated in North Carolina for drug offenses, petitioner walked away from a work detail and escaped to New York, where he remained a fugitive for 14 years (R. 107; R. 20, ¶ 17).

Likewise, petitioner distorts (Pet, pp 7-10) the administrative process which ultimately led to his termination. For example, petitioner makes much (Pet, pp 7-8) of the fact that notices were mailed to petitioner at an old address. It is true that the June 17, 1985 letter of proposed termination and the July 22, 1985 notice of termination were sent to an outdated address (R. 56, 66, 71, 73, 76). However, petitioner neglects to mention that petitioner actually received the misdirected notice. A veterans' affairs ombudsman wrote the Civil Service Department on September 30, 1985, advising of petitioner's correct address *and* that petitioner, in fact, had received a copy of the actual notice on September 9, 1985 from the New York State Department of Labor (R. 67, 92-94). On October 7, 1985 (one week after being notified of petitioner's correct address), Civil Service sent a letter to petitioner's correct address, enclosing copies of the prior notice (R. 41-42, 44, 95-96).

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[1] Citations to "Pet" are to the Petition for a writ of certiorari. Citations to "App" are to the appendix to the Petition. Citations to "R. ____" are to the Record before the Appellate Division of New York State Supreme Court.

The October 7, 1985 letter to petitioner contained the following notice, affording him an opportunity to refute the findings of Civil Service that he had lied on his employment application about his narcotics conviction (R. 41-42, 95-96):

> "Although the revocation decision has been made, we will again afford you an opportunity to make an explanation and to submit facts in opposition to the determination made on July 22, 1985. We have attached a copy of that decision. In addition to the derogatory information, your explanation should include why you checked the box designated 'No' as to question 11D of your application of May 14, 1981 ('Have you ever been convicted of any crime [felony or misdemeanor]'). See the copy attached.
>
> "After receipt of your explanations, the Investigations Bureau will review their July 22, 1985 decision and you will be immediately notified. If we determine that our July 22, 1985 decision was correct, you will have thirty days from the date of that notification to appeal the determination to the Civil Service Commission." (R. 41-42, 95-96)

Petitioner castigates Civil Service and his employer, the Department of Correctional Services (DOCS) (Pet, pp 10, 25), for charging him with certain offenses such as altering the spelling of his name, date of birth and social security number to evade detection of his fugitive status. Petitioner fails to mention that, prior to the informal hearing, and before the final revocation determination, DOCS expressly withdrew those charges (R. 99, 103). On November 18, 1985, DOCS wrote to Civil Service indicating that the *only* charge upon which the employer would rely as a

basis for termination was the statutory ground, namely falsification on an employment application of a history of criminal conviction (R. 46-47, 99, 102-103). Thus, petitioner's colorful scenario (Pet, pp 10, 25) of a formless, surprise hearing over multiple, vague charges is a blatant misrepresentation. He was terminated because he falsified his employment application (R. 54, 99, 103, 116).

On December 3, 1985, Civil Service sent a letter, certified mail, to petitioner's correct address, with a copy to his attorney (R. 48, 105). This letter notified petitioner that the Civil Service Commission would consider his appeal at an informal hearing to be held on December 17, 1985 (R. 48, 72, 105). The Commission heard presentations by petitioner and his attorney (R. 72). Petitioner's personal presentation included a plea for discretionary relief (R. 140).

Pursuant to its longstanding practice and in accordance with a long line of precedent construing Civil Service Law § 50(4),[2] Civil Service determined that petitioner was not entitled to a plenary hearing because, despite ample opportunity to do so, he had never denied or challenged the decisive facts that he had a prior criminal record and that

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[2]New York decisional law construing Civil Service Law § 50(4) has consistently held that where operative and material facts are in dispute that bear on the truth or falsity of an alleged misstatement on an employment application, then but only then is a petitioner entitled to a more formal hearing. *See, e.g., Adler v Lang*, 21 AD2d 107, 109, 111-112, 248 NYS2d 549, 554-555 (1st Dept 1964) (where it was contended that the Civil Service Commission erroneously relied upon a youthful offender adjudication to establish a conviction for a "crime", petitioner was entitled to a hearing where petitioner could present evidence); *Reisman v. Codd*, 54 AD2d 878, 879, 389 NYS2d 89, 90 (1st Dept 1976) ("There being no triable issue of fact, a hearing was unnecessary").

he had falsified that fact to obtain employment in New York State's prison system (R. 46-47, 101-102).[3]

On January 14, 1986, Civil Service issued a final determination adverse to petitioner (R. 54, 116). The Civil Service Commission held that petitioner had falsified his criminal record on his employment application, and, hence, was disqualified from the sensitive position of "Temporary Release Interviewer" at State prisons (R. 54, 116). The Commission ordered him terminated as of January 16, 1986, and awarded him full back-pay from August 9, 1985 to January 15, 1986 (R. 54, 116).

Decisions Below

The Appellate Division, after reviewing the facts, procedural history and contentions of the parties (App, C-4—C-7; 148 AD2d 178, 179-181; 544 NYS2d 230, 231-233), considered whether, and if so, to what extent, *Loudermill* altered the pre-existing New York caselaw which had sustained the constitutionality of New York Civil Service Law § 50(4) against due process challenges (App, C-7—C-8; 148 AD2d at 181-182; 544 NYS2d at 232). Acknowledging that prior New York decisional law[4] upholding the constitutionality of this statute had been based, in part, on the reasoning that appointments procured through falsification of employment applications

[3]Although plaintiff asserts in his petition (Pet, pp 24-25) that DOCS and Civil Service had no "proof" of petitioner's falsified employment application, that is yet another distortion. The judgment of conviction is in the record (R. 39), as is a copy of petitioner's sworn employment application denying any criminal history (R. 87). Moreover, his own civil complaint in the case at bar admitted the fact of his criminal conviction (R. 18, ¶ 9). The decisive facts are proven by petitioner's own papers!

[4]*Prasad v. Merges*, 65 AD2d 663, 409 NYS2d 815 (3d Dept 1978), *appeal dismissed*, 46 NY2d 712, 415 NYS2d 1028 (1979), *cert. denied*, 444 US 861, *appeal dismissed*, 444 US 958.

became void *ab initio* upon discovery of the falsification, the Appellate Division held that that rationale was no longer valid after *Loudermill* (App, C-7—C-8; 148 AD2d at 182; 544 NYS2d at 232).

The court stated that since termination was permitted, but not required, upon discovery by the employer of a material falsification, such an appointment was not void *ab initio;* rather, the employer had discretion to revoke it (App, C-7—C-8; 148 AD2d at 182; 544 NYS2d at 232). Therefore, prior New York caselaw terminating employment automatically as void *ab initio* was overruled and, instead, an employee in petitioner's position was possessed of a limited property interest, "in that he is entitled to expect that where there are sufficient mitigating circumstances he will not be terminated" (App, C-8; 148 AD2d at 183; 544 NYS2d at 233). This meant that he must be afforded a meaningful opportunity to invoke the discretion of the decisionmaker as a precondition to an actual termination (App, C-8; 148 AD2d at 183; 544 NYS2d at 233).

The court then evaluated New York's statute against the *Loudermill* criteria. The Appellate Division held that the scope of the hearing depended upon the nature of the interest involved and did not have to be elaborate (App, C-9; 148 AD2d at 183; 544 NYS2d at 233). Minimally, the employee would be entitled to a pretermination opportunity to respond, coupled with post-termination administrative review (App, C-9; 148 AD2d at 183; 544 NYS2d at 233).

> "We are satisfied that the pretermination notice and opportunity to respond in writing with facts and explanations, the procedure provided for in Civil Service Law § 50(4), coupled with postter-

> mination administrative review meets that minimum with respect to the limited property interest involved here."

(App, C-9; 148 AD2d at 183; 544 NYS2d at 233.) The court explained that while petitioner was initially deprived of prior notice of termination, petitioner was not thereby aggrieved because the Commission retroactively awarded back-pay (App, C-9; 148 AD2d at 183; 544 NYS2d at 233). In effect, the earlier termination was transferred into a suspension with pay (App, C-9; 148 AD2d at 183; 544 NYS2d at 233).

> "Since petitioner's effective termination did not come about until after his hearing before the Commission, of which he was given prior notice and at which he had an opportunity to respond, he was not deprived of his constitutional right to due process; reinstatement and a further hearing would therefore be redundant."

(App, C-9; 148 AD2d at 183; 544 NYS2d at 233.)

The New York Court of Appeals subsequently dismissed petitioner's appeal purportedly taken as of right (App, B-1; 75 NY2d 765; 551 NYS2d 906), and denied a motion for leave to appeal (App, A-1; 75 NY2d 707; 554 NYS2d 833).

ARGUMENT

POINT I.

The writ should be denied, as there is no conflict of decisional law.

The writ should be denied. There simply is not, as petitioner contends, any conflict in decisional law between *Loudermill* and the case at bar.

In *Loudermill,* this Court held that, to allow the employee a meaningful chance to invoke the discretion of the decisionmaker, some kind of pretermination hearing was necessary. 470 US at 544-545. Due process contemplated that an employee have an opportunity to present reasons, either in person or in writing, why proposed action should not be taken. 470 US at 546. Yet, this Court specifically noted that such hearings "need not be elaborate". 470 US at 545. While a tenured employee is entitled to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to present his side of the story, he is not entitled to more prior to his termination. 470 US at 546.

Petitioner received *all* of those rights, as the court below explained (App, C-9; 148 AD2d at 183; 544 NYS2d at 233). There is even a measure of irony in that petitioner here received those due process rights even though he never disputed the factual accuracy of the basis for his termination. He never denied that he falsely swore on his employment application that he had never been convicted of a crime, whereas the petitioner in *Loudermill* claimed that there was an error of fact as to whether he "lied" on his employment application. *See, Loudermill,* 470 US at 544, n 9 ("Loudermill's dismissal turned not on the objec-

tive fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he lied on his application form."); 844 F2d 304, 307 (decision on remand) (because the Ohio employment form only asked whether the applicant had "ever been convicted of a crime [felony]?", and because he received a suspended sentence, Loudermill had a colorable claim that he had *not* falsified his employment application). Thus, there was an open question of fact in *Loudermill* as to the "correctness" of the decisive or operative fact leading to his dismissal. By contrast, in the case at bar, despite ample notice of the charges, petitioner never claimed the charge was false or that any evidence existed to rebut it.

The Appellate Division here held, in reliance on *Loudermill,* that petitioner was entitled to an informal hearing so that he could invoke the discretion of the decisionmaker (App, C-8; 148 AD2d at 182; 544 NYS2d at 203). In other words, since termination for having falsified the employment application was not mandated, but rather was in the discretion of the Civil Service Commission, petitioner was entitled to present reasons and arguments why he should be retained as an employee. A subsequent decision, by another Appellate Division, is to similar effect. *Prue v. Hunt,* ___ AD2d ___ , No. 1660/89 (4th Dept May 11, 1990); accord, *Stewart v. Civil Service Comm.,* 84 AD2d 491, 492, 446 NYS2d 948, 949 (1st Dept 1982). Thus, there is no conflict whatsoever with *Loudermill,* however much petitioner strains to create one. Precisely as contemplated by *Loudermill,* petitioner received a meaningful opportunity to invoke the discretion of the decisionmaker.

In any event, petitioner's argument also fails because he misunderstands the nature of the property rights under

New York law. The scope of the due process hearing should be correlated with its purpose, so that the petitioner has a fair opportunity to protect his justifiable interests. In *Loudermill,* and in the cases which preceded it, this Court held that the nature of the property right is measured by State law. *Loudermill,* 470 US at 538; *Bishop v. Wood,* 426 US 341, 344 (1976); *Bd. of Regents v. Roth,* 408 US 564, 576-578 (1972); *Perry v. Sindermann,* 408 US 593, 601-602 (1972).

Meaningful discussion of the nature of his property rights under New York law is missing from the petition. Petitioner's reading of New York statutes (Pet, pp 15-17) simply gives short shrift to the interplay between two statutes and the court interpretations of them. Petitioner focuses (Pet, pp 7, 11, 15, 16, 17) on the "termination for cause" statute (Civil Service Law § 75 [App, F-1—F-3]), while downplaying (Pet, pp 15-17) the degree to which the property right codified in section 75 is simultaneously limited in the narrow circumstance of "falsified employment applications", the situation present in Civil Service Law § 50 cases.

Petitioner ignores the fact that, as a matter of public policy, New York's Legislature limited the scope of the presumed right to continued employment where an applicant cheated another deserving candidate out of a job by lying on the employment application. In those circumstances, the nature of the property right, as the courts below held in this case (App, C-8; 148 AD2d at 183; 544 NYS2d at 233), is something less than that of a regularly-tenured employee charged with a disciplinary infraction. In other words, those who have fraudulently obtained tenure have less of an expectation of permanent employment than those who have legitimately earned it. That is not to say someone in petitioner's shoes has no property rights. Rather, as definitively interpreted in the case at

bar, the nature of the legitimate expectation is that the employee "is entitled to expect that where there are sufficient mitigating circumstances he will not be terminated" (App, C-8; 148 AD2d at 183; 544 NYS2d at 233).

Thus, giving adequate deference to the obvious legislative purpose of section 50 (to afford some deterrent against dishonest employment applications), the courts below held, quite reasonably in our view, that the employee's legitimate expectation was limited to a fair opportunity to appeal to the discretion of the ultimate decisionmaker. Petitioner was clearly given that opportunity. He should not be permitted to bootstrap his limited property interest under section 50 into broader rights under a different statute (section 75) geared to terminations for misconduct on the job. Petitioner's reading of New York statutes would simply render section 50 meaningless. Such a spurious reading of the statutes would simply create the incentive for would-be employees to falsify their applications.

There simply is no conflict with *Loudermill*. The court below and another Appellate Division in *Prue v. Hunt, supra,* have each held that when, as here, a termination is discretionary, the employee is entitled to a pretermination opportunity to be heard and to present facts and arguments why the decisionmaker should exercise its discretion in favor of the employee. There is no reason to grant certiorari when the state appellate courts have interpreted state statutes to bring them into conformity with this Court's *Loudermill* decision.

POINT II.

There is no defect in post-termination procedures.

Petitioner also contends (Pet, Point III, pp 22-26) that there were defects in post-termination procedures. That argument is meritless. As the Appellate Division held, the ultimate decision of the Civil Service Commission was subject to article 78 review (NY CPLR article 78), where petitioner can seek judicial review (App, C-8; 148 AD2d at 182; 544 NYS2d at 233). That review would afford petitioner the opportunity to demonstrate that the Commission's decision was arbitrary or illegal, or without a foundation in substantial evidence (App, C-8; 148 AD2d at 182; 544 NYS2d at 233).

Petitioner claims (Pet, pp 12, 22-26) that the post-termination procedures were constitutionally inadequate. He objects (Pet, pp 12, 23) to the absence of written procedures for the appeal to the Civil Service Commission, the receipt of *ex parte* submissions, the absence of sworn testimony and the absence of a written record. Those contentions are either misleading, irrelevant or both.

Petitioner's concern with formality of procedure masks the absence of any substance to his basic claim. As detailed above, he was entitled only to a limited hearing geared to a discretionary review of whether extenuating circumstances existed to excuse petitioner's indisputed falsification of his criminal history on his employment application. Rigid "procedure" or written protocols for such a hearing would have added nothing and might have chilled the very flexibility which is desirable in such hearings.

Likewise, the assertion (Pet, pp 12, 23-24) about *ex parte* submissions is very misleading. The submission

(which petitioner imprecisely attributes [Pet, p 12] to all the "respondents") was simply a detailed chronology memo provided to the Civil Service Commission by Civil Service staff (R. 106-110). It was nothing more than a routine "bench memo" of the type law clerks routinely prepare for courts. Moreover, there was nothing unfair or biased in the memo. Indeed, it candidly advised the Civil Service Commission of the errors of its own staff in initially mailing notices to an incorrect address (R. 109). Thus, the whole issue of alleged improprieties from *ex parte* submissions is a red herring.

Similarly, the concern over the absence of sworn witnesses is inconsequential. This was *not* a disciplinary hearing for infractions on the job where the believability of prosecution witnesses was an issue. In the context of petitioner's admittedly false statement on his employment application, the hearing was geared towards allowing petitioner an opportunity to explain why he should be retained notwithstanding his dishonesty in his employment application. Moreover, there has been no suggestion by petitioner that his statements would have been any different if he had been under oath. Thus, this issue is simply immaterial.

Finally, the absence of a transcript of proceedings (Pet, p 12) is not a shortcoming of constitutional dimensions. Of course, due process being a flexible concept, there is no such blanket requirement of formality. *See, Parham v. J.R.*, 442 US 584, 607 (1979) ("It is not necessary that the deciding physician [reviewing voluntary admissions of minor children by parents to mental hospitals] conduct a formal or quasi-formal hearing. A state is free to require such a hearing, but due process is not violated by use of informal traditional medical investigative techniques."). In *Mathews v. Eldridge*, 424 US 319, 334-335 (1976), this

Court explained that the scope of process that is due requires consideration of three factors: first, the private interest affected; second, the risk of an erroneous deprivation of that interest and the probable value, if any, of additional safeguards; and, third, the government's interest, including the fiscal and administrative burdens that the additional procedural requirement would entail.

Measured by the *Mathews v. Eldridge* criteria, there is no need for a formal on-the-record hearing. First, it is, of course, true that a right to employment is a significant interest. That factor—and that factor alone—weighs in petitioner's favor. Second, there is very little risk of an erroneous deprivation when, as here, the petitioner (with the assistance of his attorney) is making a personal plea for discretionary relief to the ultimate administrative decisionmaker. The nature of a discretionary decision simply is not enhanced, nor its accuracy or correctness assured, by a requirement of a formal hearing on the record. As this Court has held in the analogous circumstances of discretionary parole releases, the fact that inmates are entitled to a hearing before the discretionary decisionmaker does *not* equate with an entitlement to a formal hearing. *Greenholtz v. Nebraska Penal Inmates*, 442 US 1, 14-16 (1979). In *Greenholtz*, this Court rejected a claim that due process required a decisionmaker to furnish a detailed statement of the "evidence" on which the discretionary determination rested.

> "To require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate the Board's parole-release determination with a guilt determination. * * * The Board's decision is much like a sentencing judge's choice—provided by many states—to grant or deny Probation fol-

> lowing a judgment of guilt, a choice never thought to require more than what Nebraska now provides for the parole-release determination. Cf. *Dorszynski v. United States,* 418 U.S. 424 (1974). The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more."

442 US at 15-16.

Finally, the third factor—administration burden and cost—clearly weighs against petitioner. Cf. *Ingraham v. Wright,* 430 US 651, 680-682 (1977) (incremental benefits would not justify the costs).

In sum, the *Mathews v. Eldridge* criteria used to assess the scope and type of due process hearing clearly weigh heavily against petitioner's argument.

Thus, there simply is no merit to the claim of deficient post-termination procedures.

CONCLUSION.

The writ should be denied.

Dated: Albany, New York
July 27, 1990

Respectfully submitted,

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